Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MEMPHIS HOUSING AUTHORITY,

Petitioner,

v.

TARA THOMPSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The issues presented in this case have been addressed in a number of state courts and once in a federal appeals court with conflicting results. The major issues of this case are as follows:

1. Whether a public housing authority is authorized by the Affordable Housing Act, 42 U.S.C. § 1437d(1)(6), and the Regulations promulgated by HUD under that Act, to evict a tenant solely for the drug related criminal activities committed in the tenant's unit by an invited guest regardless of the tenant's lack of knowledge of the activity?

2. Whether, under the United States Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the Tennessee Supreme Court should have deferred to HUD's explicit finding that under the Affordable Housing Act, 42 U.S.C. § 1437d(1)(6), a "tenant should not be excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit?"

3. Whether the Tennessee Supreme Court should nullify a Federal Legislative Act or Regulations based upon hypothetical applications of statutory language?

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The Memphis Housing Authority hereby petitions this Honorable Court to issue a writ of certiorari to review the judgment of the Supreme Court of Tennessee entered in this case on February 20, 2001.

OPINIONS OF THE COURTS BELOW

The opinion of the Supreme Court of Tennessee of which the petitioner seeks review is reproduced at **App. 1a** and is reported at 38 S.W.3d 504 (Tenn. 2001). The Supreme Court on March 15, 2001 entered an order denying a timely petition for rehearing and correcting the opinion entered on February 20, 2001. The order is reproduced at **App. 100a**. The opinion of the Tennessee Court of Appeals is reproduced at **App. 44a**. The order of the trial court, the Circuit Court of Shelby County, granting summary judgment is reproduced at **App. 80a** and the order of the trial court, the Circuit Court of Shelby County, denying motion for summary judgment is reproduced at **App. 83a**.

STATEMENT OF JURISDICTION

This is an appeal from a judgment of the Supreme Court of Tennessee, which was entered on February 20, 2001. **App. 1a**. Petitioner filed a timely Petition for Rehearing seeking a discretionary rehearing by the Tennessee Supreme Court. That Petition for Rehearing was denied by Order entered on March 15, 2001 at **App. 100a**.

The Tennessee Supreme Court has decided an important question of federal law in a manner that conflicts with the decision of another state court of last resort, other state appellate courts and a United States Court of Appeals decision.

The decision of the Tennessee Supreme Court was based solely on its erroneous interpretation of a federal statute, 42 U.S.C. § 1437d(1)(6), and the regulations promulgated thereunder. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

A. Statutory Provision Involved

Each public housing authority shall utilize leases which

> (5) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, or any drug related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

42 U.S.C. § 1437d(1)(6) (Supp. 2000).

B. Regulatory Provision Involved

To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:

> (B) Any drug-related criminal activity on or near such premises. Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

24 C.F.R. § 966.4(f)(12)(I).

STATEMENT OF THE CASE

On October 17, 1997, the appellant, Tara Thompson, executed a lease and began residing in an apartment in the Fowler Homes Housing Development ("Fowler Homes"). Fowler Homes is owned and operated by Memphis Housing Authority ("MHA"), a federally funded public housing authority within the meaning of the United States Housing Act of 1937, as amended, 42 U.S.C. § 1437 *et seq.* ("Federal Housing Act"). A federal statute requires that public housing authorities, such as MHA, use leases that:

> provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control shall be cause for termination of tenancy.

42 U.S.C. § 1437d(l)(6) (Supp. 2000). In order to comply with this federal statute, MHA included provisions in its lease agreements that require a resident:

> [t]o refrain from and cause household members, guests, or persons under the resident's control from engaging in any criminal activity or unlawful activity that threatens the health, safety or right to a peaceful enjoyment of the Memphis Housing Authority's public housing premises by other residents or employees of the Memphis Housing Authority which includes but is not limited to any drug-related criminal activity on or off the premises.

The lease further provides that cause for termination exist if "the resident, any members of the household, a guest or other person under the resident's control" engage in "any drug-related criminal activity on or off the premises." The lease agreement Thompson signed contained these provisions.

Thompson was pregnant with her third child when she moved into her Fowler Homes apartment in October of 1997. Tallen Williams, the father of Thompson's unborn child, was incarcerated in the Shelby County Jail in December of 1997. Thompson visited Williams at the jail on three occasions. During these jail visits, Williams told Thompson that he had been jailed for violating his probation by failing to perform community service. Williams did not tell Thompson why he initially had been placed on probation, and Thompson did not inquire further into Williams' criminal record.

Thompson and Williams' child was born on January 13, 1998. Less than one month later, on February 6, 1998, Thompson saw Williams "hanging out with his friends" at Fowler Homes. Thompson asked Williams to come to her apartment and care for her three children, including his three-week-old baby, while she did laundry. Williams agreed. While Williams was babysitting in Thompson's apartment, officers of the Memphis Police Department executed a search warrant, raided the apartment, found 0.4 grams of cocaine in the apartment[1] and arrested Williams. Williams told the police that the drugs found in the apartment belonged to him; Thompson was not questioned or detained in connection with Williams' arrest. The Police also found several handguns in the apartment. Williams denied any knowledge of the weapons.

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1. Several pieces of crack cocaine were laying on the kitchen table and one piece of what appeared to be crack cocaine was found inside the kitchen cabinet.

On February 13, 1998, MHA provided Thompson a written "Three Day Notice of Termination of Lease" which advised that her lease was being terminated based upon her violation of Section 7, paragraphs L through N of her lease prohibiting drug-related criminal activity on the premises. When Thompson refused to vacate the premises, MHA brought an unlawful detainer action.

This action was tried initially in the General Sessions Court of Shelby County upon stipulations of facts. The General Session Court granted MHA judgment for possession. Thompson appealed the judgment to the Circuit Court of Shelby County, and MHA moved for summary judgment contending, based upon the undisputed facts, that it was entitled to terminate Thompson's lease because she had violated the lease provisions prohibiting drug-related criminal activity on the premises. Thompson argued that termination of her lease was not appropriate because she had no knowledge of Williams' illegal drug activity until after his arrest. The trial court initially denied MHA's motion for summary judgment stating:

> while the contract places a heavy burden upon a tenant to take an active role in preventing the use of the premises by guests of the tenant who are engaged in illegal or drug-related activity, an entirely innocent tenant, whose ignorance of the activity is not due to indifference or lack of precautions on his or her part, should not be a basis for eviction.

App. at 97a. In denying the motion for summary judgment, the trial court emphasized that it had considered only the written stipulation of facts and had not considered Thompson's deposition, which also was in the file.

MHA filed a motion asking the trial court to reconsider its denial of summary judgment. As grounds for the motion, MHA argued that the trial court had erred by refusing to consider Thompson's deposition. The trial court agreed and granted MHA's motion for reconsideration. Upon considering Thompson's deposition, the written stipulation of facts and "the entire record," the trial court granted the motion for summary judgment and issued a writ of possession in favor of MHA.

Thompson appealed the trial court's decision to the Court of Appeals, arguing that the trial court erred by granting summary judgment to MHA because she had no prior knowledge of Williams' illegal drug activity, and further, she had no ability to control Williams' conduct. The Court of Appeals rejected Thompson's argument and affirmed summary judgment in favor of MHA. In so holding, the Court of Appeals stated:

> [T]he lease provisions placed upon Thompson the affirmative obligation to ensure that her guests did not engage in drug-related criminal activity while in her apartment. In light of the affirmative nature of this obligation, Thompson's actual or constructive knowledge of Williams' drug-related criminal activity was irrelevant. Regardless of her knowledge of Williams's drug activity, under the terms of her lease, Thompson became responsible for such activity once she granted Williams access to her apartment. Even when viewed in the light most favorable to Thompson, the evidence presented below demonstrated that Thompson violated her lease with MHA when she granted Williams access to her apartment and subsequently

> failed to cause Williams to refrain from possessing illegal drugs while in the apartment. Under these circumstances, MHA had the right to enforce the lease provisions evicting Thompson.

App. at 66a. Thompson filed an application for permission to appeal the decision of the Tennessee Court of Appeals to the Tennessee Supreme Court.

The Tennessee Supreme Court granted Thompson's application for permission to appeal to determine whether the federally mandated lease provisions allow a public housing authority to evict a tenant based upon the drug-related criminal activities of a "guest or other person under the tenant's control" regardless of whether the tenant had knowledge of the illegal activity. The Tennessee Supreme Court reversed the judgment of the Court of Appeals and held that:

> the lease agreement imposes strict liability for drug-related criminal activity engaged in by the tenant or any household member *but* permits eviction for the drug related criminal activity of "guests and other persons under [the tenant's] control" only if the tenant knew or should have known of the drug-related criminal activity and failed to take reasonable steps to halt or prevent the illegal activity.

App. at 3a. The Court also remanded the case to the trial court for reconsideration of MHA's motion for summary judgment under the above quoted legal standard.

REASONS FOR GRANTING THE WRIT

A number of state appellate courts and one federal Court of Appeals have addressed the issue of whether the relevant federal law permits a public housing authority to evict a tenant based upon the drug-related criminal activities of a "guest or other person under the tenant's control" regardless of whether the tenant had knowledge of the illegal activity. To date, there is a direct, irreconcilable conflict between those courts. The implementation and interpretation of a federal law should be the same in every state of this Country. The effects of crime and drugs on the lives of public housing residents in this Nation knows no geographic boundaries. It is incumbent upon this Court to set the standard for Public Housing Authorities and residents regarding evictions based upon the drug-related criminal activity of resident's guest.

In this case, the Tennessee Supreme Court ruled that Petitioner could not evict a tenant based solely on the drug-related criminal conduct of tenant's guest in the tenant's apartment unless the tenant had knowledge. In so doing, the Tennessee Supreme Court ignored the clear language of the statute and substituted its judgment as to the meaning of a federal statute for that of the Department of Housing and Urban Development ("HUD"), the agency charged with enforcing the statute. The Tennessee Supreme Court also put itself in conflict with the vast number of state appellate courts, which have considered the issue.

Because of this confiict, and because the federal statute at issue is a critical part of the fabric of laws and regulations woven by Congress and HUD to address the overwhelming problem of crime and drugs in public housing developments

across America, this Court should issue a writ of certiorari. This Court should then find, consistent with the explicit finding of HUD and the plain terms of the statute as enacted by Congress, that a resident should not be excused from contractual responsibility by arguing that the resident did not know, could not foresee, or could not control the behavior of an invited guest in the unit.

A. There is a Conflict Between the Various State Courts and the Single Federal Court of Appeals Which Have Considered the Important Federal Issue Raised in This Case.

1. The Legislation and Regulations At Issue in this Case Are a Critical Part of the War Against Crime and Drugs in Public Housing Development in this country

In 1988, faced with a devastating and worsening epidemic of drug related crime and violence in public housing, Congress took decisive steps toward improving living conditions in public housing. Beginning with the observations that "the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs," and that "public and other federally assisted low-income housing in many areas suffers from rampant drug-related crime," 42 U.S.C. § 11901(1)-(2), Congress created an effective and efficient mechanism for ridding public housing of drug-related criminal activity or other crimes.

Using unmistakably clear statutory language, based on reasonable findings that such legislation was necessary[2], Congress provided that drug-related criminal activity by a public housing tenant, a member of the tenant's household, or a guest would be a sufficient ground for eviction. Specifically, Congress required all local housing authorities to use leases which:

> (5) Provide that a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.

42 U.S.C. § 1437d(1)(5) (1989).

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2. Congress made three other related findings:

> (3) Drug dealers are increasingly imposing a reign of terror on public and other federally assisted low income housing tenants;
>
> (4) The increase in drug related and violent crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures;
>
> (5) Local law enforcement authorities often lack the resources to deal with the drug problem in public and other federally assisted low income housing, particularly in light of the recent reductions in Federal aid to cities. . . .

Id. § 11901(3)-(5).

Two years later, as part of the Cranston-Gonzales National Affordable Housing Act, Pub. L. No. 101-625 § 504, 104 Stat. 4079, 4185 (1990), Congress clarified the statutory requirement, mandating that all leases:

> (5) Provide that any criminal activity that threatens safety, or right to peaceful enjoyment of the premises by other tenants, or any drug related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

42 U.S.C. § 1437d(1)(5) (1991).[3]

In response to Congress' mandate, HUD promulgated regulations that implemented this statutory prohibition against criminal activity. Housing and Urban Development: Lease Requirements, 24 C.F.R. § 966.4(1)(2)(ii) (1993), 56 Fed. Reg. 51560, 51578 (1991).

In formulating these regulations, HUD considered comments by legal aid attorneys and by tenant organizations that tenants "should not be required to 'assure' the non-criminal conduct of household members or guest, or should have only a limited responsibility to prevent criminal behavior by members of the household or guest" and

> that the tenant should not be responsible if the criminal activity is beyond the tenant's control,

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3. In 1996 Congress replaced the phrase "on or near such premises" with "on or off such premises. " *Id.* (1997). In 1998, the section was redesignated as subsection (1)(6). *Id.* (1999).

> if the tenant did not know or have reason to foresee the criminal conduct, if the tenant did not participate, give consent or approve the criminal activity, or if the tenant did everything "reasonable" to control the criminal activity.

56 Fed. Reg. 51560, 51566 (Oct. 11, 1991). Ultimately, HUD decided not to accept these suggestions. Instead, following the statute as enacted, which contained no such caveat, HUD stated quite explicitly:

> The tenant should not be excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit.

Id. at 51567.

Like the controlling statute, the implementing regulations by HUD require local housing authorities to secure leases from each of their tenants in which the tenant explicitly promises:

> To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
>
> (B) Any drug-related criminal activity on or near such premises. Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

24 C.F.R. § 966.4(f)(12)(I).

2. Courts Interpreting the Statute and the Regulations Have Reached Conflicting Results.

In this case, the Supreme Court of Tennessee held that:

> Neither federal law nor the lease provision imposes a standard of strict liability for the drug-related criminal activities of Thompson's guest or other persons under her control. The phrase "under the resident's" control permits eviction only if MHA establishes that Thompson knew or should have known of the drug-related criminal activity "of a guest or other person" and failed to take reasonable steps to prevent or halt it.

App. at 41a. The only federal court of appeals to consider the issue agreed with the Tennessee Court as to guest or other persons. "Congress did not intend § 1437d(l)(6) to permit the eviction of innocent tenants." *Rucker v. Davis*, 237 F.3d 1113 (9th Cir. 2001) (*en banc*). However, the Courts differ as to their treatment of "household members". The Tennessee Supreme Court found that the federal statute clearly imposes strict liability upon the "household members" for engaging in drug-related criminal activity. On the other hand, the Ninth Circuit Federal Court of Appeal in *Rucker* adopted a position that allows eviction only if the resident knew or should have known of the drug-related criminal activity of the "household member" and failed to prevent or halt it.

The only other state supreme court to address the issue also disagreed with the *Rucker* decision, holding that, in light of the terms of the federal statute, HUD's regulations, and the federally-mandated terms of the tenant's lease, a tenant could be evicted because of her son's conviction in a drive-

by shooting of a neighboring residence even though she "did not have any knowledge of her son's criminal activities or reason to anticipate her son's acts." *Minneapolis Public Housing Authority v. Lor*, 591 N.W.2d 700, 702-03 (Minn. 1999).

The various other state appellate courts which have considered the issue have split. Several have agreed with the holding of the Supreme Court of Minnesota that the statute and the regulations permit the eviction of a tenant based solely on the criminal activities of family members or guests. *See Ann Arbor Housing Commission v. Wells*, 240 Mich. App. 610, 616-18, 618 N.W.2d 43 (Mich. Ct. App. 2000) ("The express statutory language evinces a clear congressional intent to authorize termination of a tenancy regardless of whether the tenant was aware that his household member or guest was selling, manufacturing, distributing, or using drugs."); *Barajas v. Housing Authority of Harlingen*, 882 S.W.2d 853 (Tex. App. Corpus Christi 1994) (affirming award of summary judgment to PHA based on the plain terms of the federally-mandated lease language); *Syracuse Hous. Auth. v. Boule*, 172 Misc. 2d 254, 658 N.Y.S.2d 776, 780 (Syracuse City Ct. 1996), *aff'd*, 177 Misc. 2d 400, 676 N.Y.S.2d 741 (Onondaga County Ct. 1998), *rev'd*, 265 A.D.2d 832, 701 N.Y.S.2d 541 (N.Y. App. Div. 4th Dep't 1999) (finding that eviction without proof of knowledge of criminal activity was consistent with statute, HUD regulation and HUD "One Strike and You're Out" policy) (citing the Tennessee Court of Appeals decision in the case at bar); *Housing Authority of New Orleans v. Green*, 657 So. 2d 552 (La. App. 4th Cir. 1995), *app. denied*, 661 So. 2d 1355 (La. 1995), *cert. denied*, 517 U.S. 1169 (1996) (language of statute does not imply that tenant must have knowledge about drug activity as precondition to eviction; *South San Francisco*

Housing Authority v. Guillory, 41 Cal. App. 4th Supp. 13, 19, 49 Cal. Rptr. 2d 367, 371 (1995) (by requiring that each public housing lease contain language setting forth that drug-related activity by any member of a tenant's household is cause for eviction, Congress provided "straightforward practical method" for eviction based on strict liability). A number of state appellate courts, however, have reached the same conclusion the Tennessee Supreme Court reached in this case. *Charlotte Housing Auth. v. Patterson*, 464 S.E.2d 68 (N.C. App. 1995) (turning on lack or personal fault, control and foresee ability).

The basis for the conflict is well illustrated by the majority and dissenting opinions in *Rucker*, decided *en banc* on January 23, 2001. In *Rucker*, four public housing tenants filed suit in federal court under the Administrative Procedures Act, 5 U.S.C. §§ 701-706, seeking to enjoin eviction actions which were pending against them in state court. Each eviction action was based on the criminal activities of others of which the tenant had no knowledge.

The district court entered the requested injunction. On appeal, the original panel reversed. *Rucker v. Davis*, 203 F.3d 627 (9th Cir. 2000), *rehearing en banc granted* at 222 F.3d 614 (9th Cir. 2000).

After rehearing before the court *en banc*, the Ninth Circuit affirmed the district court. The majority found:

> [t]he statutory provision does not expressly address the level of personal knowledge or fault that is required for eviction, or even make it clear who can be evicted. . . . When [Section 1437d(1)(6) is] read in conjunction with the

> remainder of §1437d(1) and other provisions enacted at the same time, however, it appears that Congress did not intend subsection (6) to apply to eviction of innocent tenants.

Rucker v. Davis, 237 F.3d 1120, 1123 (9th Cir. 2001) (*en banc*).[4] Purporting to find further support for that conclusion in the legislative history, the *Rucker* majority rejected HUD's interpretation of the statute on the ground that it was clearly contrary to Congress' intent. *Id.* at *14. The majority also found that permitting the eviction of innocent tenants would be "unreasonable" and "absurd." *Id.* at *1129.

On the other hand, the dissenters in *Rucker* agreed with a number of the state appellate courts which have considered the issue that "[b]ecause the statute is clear on its face, HUD's interpretation is the only permissible construction of the statute." *Id.* at *1128. After analyzing the statute at length and concluding that it was not ambiguous, the dissenters concluded:

> It is obvious that when Congress authorized the eviction of innocent tenants, the potential for individual unfairness existed. Congress granted to local PHA's the power to evict and trusted that the "humane judgment" of PHA officials and the procedural protections of the Act would prevent the abuse of this power. Congress struck a balance. It did so in the face of a drug crisis and the ineffectiveness of traditional law enforcement.

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4. A petition for writ of certiorari was filed by HUD on May 24, 2001 docket No. 00-1770: *HUD v. Rucker, et al.*

> It bestowed upon the PHAs the authority challenged in this case. That authority does not violate the Constitution. This legislation should be interpreted as it was written.

Id. at *1142.

Clearly, there is a conflict that this Court needs to resolve.[5]

B. The Lower Court Ignored Both the Language of the Statute and a Definitive Interpretation of Federal Law Rendered by the Federal Agency Charged With Enforcement of That Law.

Consistent with the relevant section of the United States Housing Act, Tara Thompson's lease stated that residents are obligated:

> [t]o refrain from and cause household members, guests, or persons under the resident's control from engaging in any criminal activity or unlawful activity that threatens the health, safety or right to a peaceful enjoyment of the Memphis Housing Authority's public housing premises by other residents or employees of the Memphis Housing Authority which includes but is not limited to any drug-related criminal activity on or off the premises.

App. at 6a. The Supreme Court found this language, and the relevant statutory language, unclear "with respect to the

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5. *See* HUD Notice PIH 2001-8 (HA) at **App. 106a**.

standard that applies to a guest or other person under the resident's control." The Court found the phrase "under the resident's control" in both the lease and statute to be vague as to guests and other persons. The Court concluded:

> The phrase, "under the resident's control," relates only to the last two categories — guests or other persons. Although other courts have applied a single standard to all four categories, we conclude that applying a single standard is not consistent with the plain language of either the lease provisions in this case or the federal statutes from which they are derived. While both the language of this lease, and the federal statute from which it is derived, clearly impose strict liability upon the resident or household members for engaging in drug-related criminal activity, the language is not clear with respect to the standard that applies to a guest or other person under the resident's control.

App. at 37a. Accordingly, the Court felt compelled to look at the legislative history, where it found what it determined to be a clearly expressed legislative intent that the phrase under the resident's control permits eviction only if the Authority proves "that the resident knew or should have known of the drug-related criminal activity of a 'guest' or 'other person' and failed to take reasonable steps to prevent or halt it."

In so doing, the court ignored the clear language of the statute and the interpretation of the statute rendered by HUD, the agency charged with enforcing the statute. HUD has promulgated regulations, which make clear its view that the statute does permit the eviction of so-called "innocent" tenants, a view dictated by the terms of the statute as enacted.

In fact, in promulgating those regulations, HUD rejected comments, which suggested that was not the proper interpretation of the statute, stating that:

> The tenant should not be excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit.

56 Fed. Reg. 51567.

HUD offered several reasons for its decision. First, the

> contractual responsibility of the tenant for acts of unit occupants is a conventional incident of tenant responsibility under normal landlord-tenant law and practice, and is a valuable tool for management of the housing. The tenant should not be excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit.

Id. at 51567. HUD also noted that PHA's might often have difficulty proving in court that the leaseholder had knowledge or control over the offending person, thus making it time-consuming, costly, and otherwise cumbersome to evict households causing drug-related problems in public housing. *Id.*

This Court has repeatedly held that where the agency charged with enforcing a statute has rendered its interpretation of that statute, and that interpretation is a "permissible construction of the statute," courts may not

substitute their own judgment for that of the agency. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Here, HUD has rendered such a "permissible construction of the statute" and the lower court erred in not deferring to that interpretation. As the dissenters noted in *Rucker* "because the statute is clear on its face, HUD's interpretation is the only permissible construction of the statute."

Like the majority in *Rucker*, the Supreme Court of Tennessee here has substituted its own judgment for that of Congress and that of HUD. In so doing, it far exceeded its proper role, essentially nullifying an important part of the federal plan for combating crime and drugs in America.

C. The Lower Court Should Not Nullify A Standard Or Legislative Act Based upon Hypothetical Applications Of Statutory Language

The Court, in its opinion, found the standard of strict liability sensible when applied to the first two separate categories of people referred to in the lease and Act. The Court however found the standard to be "absurd" when applied to guest or other persons under the tenant's control, the third and fourth separate categories. It appears that the Court reached this finding based upon a hypothetical. The Court opined:

> Finally, while a standard of strict liability is sensible when it is applied to the resident or household members, such a standard yields absurd results when it is applied to guests or other persons. . . . We do not believe Congress intended such an absurd result.

App. at 102a. The Tennessee Supreme Court should not rewrite legislative enactments and ignore the expertise of the executive agency (HUD) based upon what the Court assumes may be absurd. It is the Court's obligation to read the statute as it is written although "acknowledging the reality that the breath of the statute may exceed the precise evil to be eliminated." *Brogan v. United States*, 522 U.S. 398, 403 (1998).

The Tennessee Supreme Court in determining the standard to be applied in drug-related criminal activity of a tenant's guest should not set the standard based upon envisioning the most extreme applications conceivable but deal with those cases if and when they arise. The Tennessee Supreme Court should limit its review to the controversy actually presented.

This Court has repeatedly rejected judicial review of hypothetical applications of statutory language, *FCC v. Pacifica*, 438 U.S. 726, 743 (1978).

CONCLUSION

For the foregoing reasons, Petitioner Memphis Housing Authority respectfully requests that this Court issue a writ of certiorari to the Tennessee Supreme Court.

Respectfully submitted,

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